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ALEXANDER L. STEVAS,
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84-1039

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

HARRY F. OLSON,

PETITIONER,

versus

WILLIAM D. LEEKE, Commissioner,
DEPARTMENT OF CORRECTIONS and
THE ATTORNEY GENERAL OF SOUTH
CAROLINA,

RESPONDENTS.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI - CRIMINAL CASE

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QUESTION PRESENTED

Does Due Process require a less restrictive method of initial restraint than criminal prosecution for the sale of explicit sexual materials in instances wherein the mode of dissemination carries no danger of offending the sensibilities of unwilling recipients or of exposing the material to juveniles?

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prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION TO OPINION BELOW

The opinions relevant to this case are reported in State v. Barrett and Olson, 278 S.C. 92, 292 S.E.2d 590 (1982), Olson v. Leeke, an unpublished opinion of the District Court of South Carolina, Olson v. Leeke, ____F.2d _____, No. 83-6650, 4th Circuit, October 2, 1984. All opinion are attached as an Appendix to this Petition.

JURISDICTION

The Court of Appeals issued its opinion and entered its judgment on October 2, 1984. The Petitioner did not

seek a rehearing in that court. He invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution provide:

> Congress shall make no law...abridging the freedom of speech, or of the press...
>
> No person shall be...deprived of life, liberty, or property, without due process of law...
>
> [N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Harry F. Olson, while being employed as a clerk in an adult bookstore was indicted and tried for the sale of a magazine to an undercover agent of a local sheriff's department. Mr. Olson, a disabled, sixty (60) year old, was convicted of a charge of Sale of Obscene Materials and sentenced to one (1) year incarceration. It was conceded at trial that the bookstore only sold its materials to willing adult customers. Mr. Olson's conviction was appealed to the South Carolina Supreme Court which affirmed the conviction and sentence. Subsequently the Petitioner sought a Petition for Certiorari from the State Court on the issue of whether a state must

set community standards at a level of tolerance rather than at a level of decency in determining the patent offensiveness of the work. Certiorari was denied and the Petitioner pursued habeas corpus relief on that issue and on the issue raised in this Writ. Habeas relief was denied by the United States District Court. That judgment was affirmed by the Court of Appeals for the Fourth Circuit in a published opinion issued October 2, 1984.

REASONS FOR GRANTING WRIT

The Court of Appeals has decided an important constitutional issue which has not been, but should be, settled by this Court.

This is a case which involves

fair notice being provided to a bookseller as to the illegality of his actions prior to criminal prosecution. At issue is the delicate balance involved in prosecution of criminal laws for the protection of society and the individual citizen's protection from loss of liberty without fair notice as to the illegality of his actions.

This Court addressed the issue of fair notice in Miller v. California and found that the guidelines set forth in that opinion provided adequate notice to "a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. 15, 27 (1973). It was upon this basis that the Court of Appeals found that "fair notice" had been

provided Mr. Olson. The Court of Appeals' ruling ignores the factual context of the decision in Miller and the public interest which apparently was to be protected by that ruling.

Miller dealt with a factual context wherein explicit materials were "thrust upon" unsuspecting and unwilling recipients through the mail. There were also no precautions taken to keep the materials away from juveniles and there were elements of pandering involved in the manner of distribution. This Court made it clear that "it is in this context that we are called on to define the standards which must be used to identify obscene materials that a state may regulate

without infringing upon the First Amendment as applicable to the states through the Fourteenth Amendment." Miller at pp. 19-20.

Obscenity prosecutions differ from any other criminal prosecutions in that a certain material cannot be designated as obscene or contraband until a fact-finder has so found. This Court has allowed such ambiguity through balancing the degree of public interests set forth in Miller against the lack of certainty provided the bookseller. This Court has indicated the same interests are not necessarily at stake where there is no danger of offending unwilling recipients or of exposing the materials to juveniles. See e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106 (1973) (Brennan,

J. dissenting opinion); U.S. v. Reidel, 402 U.S. 351, 357 (1971). As there is a reduced societal interest where these dangers are not involved there should be a reevaluation of the method of regulation of such materials.

We do not submit that there should be no regulation of potentially obscene materials sold to willing adults, but simply that the initial method of regulation should be in line with the societal interest sought to be protected. Our system of justice has long recognized that though a societal interest be legitimate and even substantial the accomplishment of this interest should be tempered in order that fundamental personal freedoms are not stifled. Shelton

v. Tucker, 364 U.S. 479, 488 (1960), Cantwell v. Connecticutt, 310 U.S. 296 (1940).

We have suggested that this form of regulation should come first through the civil courts in cases not involving juveniles and unwilling adults. Such regulation accomplishes the ends sought for protection of society's morals and avoids the notice problem inherent in obscenity prosecutions. If a bookseller should continue to distribute materials subsequent to being provided civil notice as to its obscenity, notice has been provided and criminal prosecution could follow.

The Court of Appeals correctly pointed out that there is no requirement in case law for such notice. The

principle involved has been reviewed by this Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). There this Court found that the civil procedure "provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." Paris at 55.

Basic principles of notice have been set forth in Miller. We do not question the need for such indefiniteness in those cases. In the context of this case, however, the same interests are not involved and a greater danger of censorship exists.

CONCLUSION

The judgment below found that there was no basis in case law for the principles espoused by the Petitioner. The issues herein involve substantial constitutional principles of fairness, due process of law, and freedom of speech. This case involves substantial and important Federal constitutional issues which have not been previously addressed by this Court, but should be settled by this Court. The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted, this the 29th day of November, 1984.

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A P P E N D I X

South Carolina Supreme Court
Opinion No. 21722, filed 6/8/82...A.1

U. S. District Court
Order, filed 4/25/83.....B.1

U. S. Court of Appeals, 4th Circuit
Opinion, Decided 10/2/84.....C.1

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

James Barrett, ... Appellant.

and

The State, ... Respondent,

v.

Harry F. Olson, ... Appellant.
(two cases)

Appeal From Richland County
John B. Grimball, Judge

Opinion No. 21722
Filed June 8, 1982

AFFIRMED

Charles W. Boyle, of Atlanta, Georgia; and Franchot A. Brown, of Columbia, for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes, Assistant Attorneys General Lindy P. Funkhouser and Martha L. McElveen, and Solicitor James C. Anders, all of Columbia, for respondent.

LITTLEJOHN, A.J.: These two obscenity cases have been consolidated for the purpose of this appeal. The separate briefs are substantially identical. The two Defendants were indicted in April of 1981 and found guilty of a violation of § 16-15-260, *et. seq.*, *Code of Laws of South Carolina* (1976), as amended. From the convictions and sentences both have appealed, submitting the same issues as questions for this court.

The proscribing statute is as follows:

> § 16-15-320. Creation, possession, purchase or importation of obscene material with intent to distribute; dissemination and promotion of such material.
>
> It shall be unlawful for any person to:
>
> (a) send knowingly or cause to be sent, to bring or cause to be brought into the State for sale or distribution, to prepare, publish, print, exhibit, distribute or to offer to distribute in the State, or to have in his possession with intent to distribute or to exhibit or to offer to distribute any obscene matter;
>
> (b) intentionally disseminate obscenity in any public place;
>
> (c) advertise or otherwise promote the sale of material represented or held out by such person as obscene;
>
> (d) knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.
>
> Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished as provided in § 16-15-430.

It is well established that obscene materials are not protected by the First Amendment of the Constitution of the United States, or the corresponding provision of the Constitution of South Carolina.

Section 16-15-260 undertakes to define obscenity, in relative part, as follows:

> Definitions.
>
> As used in § § 16-15-270 through 16-15-440:

(a) "Obscene or obscenity" means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational or scientific value. In order for any matter to be determined "obscene" the trier of fact must find:

(1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and

(2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and

(3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(b) "Prurient Interest" means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(c) "Patently Offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

The first issue submitted to the Court, as taken from the briefs of the Appellants, is as follows:

Section 16-15-260 of the South Carolina Code is unconstitutional on its face and/or as applied to the Petitioner herein and is violative of his First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution and under the applicable corollary to the South Carolina Constitution.

In the brief of Appellants, the following admission is made:

> Except for § 16-15-260(b)(c), the statute is constitutionally unobjectionable. However, the general assembly went beyond the *Miller* standards and infringed upon the constitutional rights of citizens such as the Defendant herein when it defined prurient interest as reflective of an arousal of lewd and lascivious desires and thoughts.

The case of *Miller* referred to in counsel's brief is *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 92 S.Ct. 2607 (1973). In this case, the Supreme Court of the United States attempted to clarify the law for the state and federal law makers and courts in the problem of dealing with obscenity and pornography. It is obvious that the Court fully appreciated the legislative problems of defining obscenity when it said:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.
>
> . . . .
>
> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

We hold that the guidelines set forth in *Miller* to regulate obscenity have not been infringed by the statute and its application here. It is obvious that the variations, one of which (complained of) actually is advantageous to the Appellants. Our statute includes in the definition of "prurient interest" a requirement that the matter also be ". . .reflective of an arousal of lewd and lascivious desires and thoughts." Contrary to the argument of counsel, we think that this portion of the definition increases the burden of the government before conviction may be had.

Appellants contend that subsection (c) is unconstitutional because of a substitution of community standards of decency

and propriety for community standards of tolerance, citing *Red Bluff Drive-In, Inc. v. Vance*, 745 F.2d 1020 (5th Cir.) (1981). In this case, the Fifth Circuit Court of Appeals refused to declare a similar statute unconstitutional.

It can be forcefully argued that obscenity must be obscenity in every state or in none. At the same time, it is the law, as declared by the Supreme Court of the United States, that contemporary community standards may be considered, and, accordingly, constitution. Obscenity, like many other words, may be defined correctly in different ways. No particular verbage is required to define obscenity. Certainly the Supreme Court of the United States has not undertaken to specify the verbage to be used by the respective legislatures.

Here, as is typical in obscenity cases, counsel "picketh the nit." Squabbles over technicalities and definitions have lured the courst to write fluently, resulting, ofttimes, in overdefining obscenity. We appreciate the fact that obscenity is difficult to define; fortunately, it is not so difficult to detect. The printed material in contest here was not entered as exhibits in this Court, but quotations therefrom appear in the record. It is difficult to conceive of any definition which would not cover that which is printed in the record. Obviously, jurors applying contemporary community standards, concluded that the matter was obscene and proscribed. We, applying the same standards, agree.

Our statute is not so broad as to overcome the presumption of constitutionality. We refuse to declare it invalid.

The Appellants next contend that:

> The trial court erred in allowing the state to proceed with an original trial against [Appellants] even (sic) [though] there was no preliminary hearing and no judicial determination of obscenity as is required under § 16-15-270 of the South Carolina Code.

Code § 16-15-270, in relevant part, is as follows:

> § 16-15-270. Judicial determination of obscenity; procedure; warrants or orders of seizure; temporary restraining orders; contempt.
>
> (a) The purpose of this section is to provide a judicial determination of the question of whether

books, magazines, motion pictures or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials.

. . . .

(c) Whenever any law enforcement officer has reasonable cause to believe that any person is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of § 16-15-260, he shall, *without seizing* such material, notify the solicitor for the judicial circuit in which such material is so believed to be offered. Upon receiving such notification the solicitor for such judicial circuit shall investigate the law enforcement officer's report to determine whether or not sufficient cause exists *to seek warrants of search and seizure*. If the solicitor determines that sufficient cause does exist, he shall apply to a circuit judge sitting in the judicial circuit where the allegedly obscene material is located for warrants. (Emphasis added.)

(d) A circuit judge may *issue warrants for search and seizure to authorize seizure* of single copies of suspect material in order to preserve evidence, but only after he has determined the existence of probable cause based upon a viewing of the allegedly obscene material itself or upon examination of factual allegations contained in any affidavit in support of such warrant. (Emphasis added.)

. . . .

(g) Nothing contained in this section shall prevent the obtaining of material by purchase or by production under the provisions of § 16-15-270.

. . . .

It is apparent that this code section is designed to protect merchants of printed material from searches and seizures which might be determined unwarranted. The protection is a limitation on search and seizure; it is not a limitation on prosecution.

The undisputed facts in this case are that police officers went to the stores where the Appellants worked, bought and paid for printed material. They proceeded to prosecute the Appellants in the usual fashion. It is their contention that they were entitled to a judicial determination of whether the material was obscene ". . .prior to their seizure or prior to criminal prosecution relating to such materials." They argue that no prosecution can be had before the materials are submitted to a circuit judge and found to be obscene. In *The State v. Oxendine*, 268 S.C. 828, 233 S.E.2d 118 (1977), in construing a similar statute now repealed, this Court held that:

> . . .where the alleged obscene matter is purchased there is no necessity for such a procedure, since the owner has voluntarily relinquished his rights therein. The preliminary hearing procedure provided by § 43-232 of the Code amply protects the rights of the accused under such circumstances.

While the statute involved in *Oxendine* is not exactly the statute involved here, we think that the rationale is similarly applicable. In cases, such as here, where there is no seizure, a determination by a circuit judge is not required. We think that a reasonable interpretation of the statute, quoted hereinabove, is that a judicial hearing by a circuit judge must be held prior to seizure, but if not held prior to seizure, at least must, upon request, be held after seizure prior to ". . .criminal prosecution relating to such materials."

It is obvious that the Legislature recognizes that the rights of a dispenser of literature are different when property is taken against the will of the owner and, on the other hand, when the owner parts with the same in exchange for money.

We find all exceptions without merit and the verdicts and sentences of the lower court are, hereby

AFFIRMED.

LEWIS, C.J., NESS, GREGORY and HARWELL, JJ., concur.

APPENDIX B

United States District Court
For the District of South Carolina
Columbia Division

Harry F. Olson,	)	C/A No. 83-373-0
Petitioner,	)	
vs.	)	ORDER
William D. Leeke, et al.,	)	
Respondents.	)	

This matter is before the Court upon Petition for Habeas Corpus filed on February 11, 1983. Additionally before the Court is the Respondents' Motion for Summary Judgment and Return requesting dismissal of the Petition. This matter came to be heard on April 5, 1983. The State was represented by Brian P. Gibbes,

Senior Assistant Attorney General for the State of South Carolina. The Petitioner was represented by W. Gaston Fairey, Esquire, and Charles W. Boyle, Esquire, a member of the Georgia State Bar, who is admitted by this Court as an attorney of record for purposes of this case.

Petitioner, Harry Olson, was convicted of distributing obscene materials pursuant to Section 14-15-260 et seq., 1976 Code of Laws of South Carolina, as amended. By exceptions and at brief on appeal to the South Carolina Supreme Court, Petitioner specifically claims that Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, is unconstitutional, contending that subsections (b) and (c) of this statute exceed the standards set forth in Miller v.

California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) and are violative of Petitioner's First, Sixth, and Fourteenth Amendment rights as guaranteed by the United States Constitution. Petitioner concedes that the remainder of Section 16-15-260 is constitutionally unobjectionable. This Court finds that the statute in its entirety is constitutionally sound and that Petitioner's claim and contentions are without merit.

Miller v. California, supra, provides guidelines which must be used to identify obscene material so that a State may regulate obscenity without infringing upon the First Amendment as applicable to the States through the Fourteenth Amendment. In order for any work to be declared

obscene, it must be determined (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest, (2) that the conduct described or depicted in the work is "patently offensive" as specifically defined by State law and, (3) that the work, taken as a whole, lacks serious social value. Miller also reaffirmed the Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1, 86 S.Ct. 975 (1976) "utterly without redeeming social value" test for obscenity; and redefined the Roth community standard to specify that obscenity shall be determined by applying contemporary community standards rather than a national community standard.

Along with the holdings set forth in

Miller, the United States Supreme Court also provided examples of what a state statute could define for regulation under the guidelines of the opinion. Petitioner contends that, because Section 16-15-260 is not a carbon copy of the Miller examples, the statute is unconstitutional. However, when providing the above-mentioned examples, the United States Supreme Court specifically cautioned:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. 37 L.Ed.2d 419, 431.

This caveat was reiterated in the later case of Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974).

> The Miller cases, important as they were in enunciating a constitutional test for obscenity ...were intended neither as legislative drafting handbooks nor as manuals of jury instruction. 41 L.Ed.2d 590, 619.

I light of this, Respondents asset that the inclusion of subsections (b) and (c) in Section 16-15-270 does not render the statute unconstitutional. Although neither subsection is specifically included in the Miller opinion, each subsection is within the constitutional guidelines set forth in that opinion.

Section 16-15-260 (b), 1976 Code of Laws of South Carolina, as amended, reads as follows:

> (b) 'Prurient interest' means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

Petitioner objects solely to the portion of Section 16-15-260 (b) which defines "prurient interest" as "reflective of an arousal of lewd and lascivious desires and thoughts," conceding that the remainder of the definition complies with Miller. Respondents submit that the allegedly objectionable portion is a valid definition of the term "prurient interest." Webster's New International Dictionary (Unabridged, 2d Edition, 1949) defines prurient as "uneasy with desire or longing' lascivious desire or thought." (Emphasis added). The American Heritage Dictionary (New College Edition, 1978) also defines prurient as "obsessively interested in improper matters, especially of a sexual nature; ...arousing or

appealing to such an interest." And, Black's Law Dictionary (5th Edition, 1979) defines prurient interest as "[a] shameful or morbid interest in nudity, sex, or excretion...'prurient' means having lustful ideas or desire ... an obsessive interest in immoral and lascivious matters." "Emphasis added). It is therefore apparent that the definition of prurient interest set forth in Section 16-15-260 (b) is a standard definition. Furthermore, Roth v. United States, supra, defines prurient interest as material tending to excite lustful thoughts. Because the Miller decision neither rejects this definition nor redefines prurient interest, the Roth definition is constitutionally sound. Therefore, Section 16-15-260 (b) provides a

constitutionally sound and linguistically correct definition of the term prurient interest.

If, as Petitioner contends, Section 16-15-260 (b) adds to the definition of prurient interest provided in Miller, the additional language narrows rather than broadens the standards necessary to prove a work is obscene. The subsection in question requires that the prosecution show that a work produces a morbid interest and reflects lewd thoughts in order to have a work declared obscene. This requirement increases the prosecutorial burden and produces a standard which is more stringent than the Miller standards. The United States Supreme Court has specifically held that, where a statute imposes a greater burden

on the prosecution than does Miller, there is no constitutional violation. See Hamling v. United States, supra; Ward v. Illinois, 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085 (1977). Since Miller permits the imposition of a lesser burden on the prosecution than does Section 16-15-260 (b), petitioner would derive no benefit from the use of the Miller standard and suffers no constitutional prejudices from the application of the current South Carolina statute.

Petitioner also objects to Section 16-15-260 (c) which provides as follows:

> (c) 'patently offensive' means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

He alleges that this subsection is

unconstitutional because it substitutes community standards of decency for community standards of tolerance, citing Red Bluff Drive-in, Inc. vs. Vance, 648 F.2d 1020 (5th Cir., 1981), reh. denied, 656 F.2d 700, and Smith v. United States, 431 U.S. 291, 52 L.Ed.2d 324, 97 S.Ct. 1756 (1977) as support.

In Red Bluff, 5th Circuit Court of Appeals refused to declare a similar Texas statute was unconstitutional finding that:

> [w]hether Texas has exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" is a significant question. But before the constitutional issue can be resolved, the interpretation of the critical word must be left to the State courts. ...If on its face the statute warned too broadly, deference to the State courts would be inappropriate. Such is not the case here. There is ample room to formulate

> jury instructions that comport with ... the First Amendment rights of defendant charged with obscenity offenses. (Emphasis added). 648 F.2d 1020, 1029.

In finding that jury instruction can make a somewhat broad statutory definition constitutionally sound, Red Bluff followed the direction of the United States Supreme Court in the post Miller decision of Smith v. United States, supra, which found as follows:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in the community does not mean ... that obscenity convictions will be virtually unreviewable ... [J]uries must be instruct4ed so that they consider the entire community and not simply their own subjective reactions. 52 L.Ed.2d 324, 338.

Respondents submit that, like the Red

Bluff statute, Section 16-15-260 (Section 16-15-260 (c) specifically) is not on its face so broad that it is without a doubt unconstitutional. Respondents further submit that any problems with the statute were corrected by the trial court's instructions to the jury. During charges to the jury the trial court instructed on this issue on several occasions as follows:

> Now, we come to the term community standards when the statute provided that the trier of fact, which I pointed out was you, the jury, must find (1) that the average person applying contemporary community standards would find that the matter taken as a whole appeals to the prurient interest, and community standard is described--standards used in determining prurient appeal, patent offensiveness of the standards of the State of South Carolina, and deals with the average person and the definition of person. Person means any individual corporation, partnership, association, firm, club or other legal or commerical entity.

and

> The term average person as used in our statute is incapable of expression in terms of measure or amount. However, the term signifies that the person referred to is the ordinary or usual type. When considering the contemporary community standards, you must leave room for some latitude of judgment and while there is an undeniably subjective element in the test as a whole, the dominance of the theme is a question of constitutional fact. In determining contemporary community standards, you are the judges of what a common standard of the community are, you should apply the standards of the average man of the community.

These instructions clearly indicate that the jury was advised to use the average man community standard set forth in Miller.

Finally, the South Carolina Supreme Court has affirmed this conviction and unequivocally held that:

We hold that the guildelines set forth in Miller to regulate obscenity have not been infringed by the statute in its application here. It is obvious that the Legislature has conscientiously followed the guidelines of Miller with only minor variations, one of which (complained of) actually is advantageous to the Appellants. Our statute includews in the definition of 'prurient interest' a requirement that the matter also be '...reflective of an arousal of lewd and lascivious desires and thoughts.' Contrary to the argument of counsel, we think that this portion of the definition increases the burden of the government before a conviction may be had.

Appellants contend that subsection (c) is unconstitutional because of a substitution of community standards of decency and propriety for community standards of tolerance, citing Red Bluff Drive-in, Inc. v. Vance, 748 F.2d 1020 (5th Circuit) (1981). In this case, the 5th Circuit Court of Appeals refused to declare a similar statute unconstitutional.

It can be forcefully argued that obscenity must be obscenity in every State or in none. At the same time, it is the law, as declared by the Supreme Court of the United States that contemporary community standards may be considered, and, accordingly, the State Legislatures, courts, and juries are allowed certain latitute--all under the same Constitution. Obscenity, like many other words, may be defined correctly in different ways. No particular verbage is required to define obscenity. Certainly the Supreme Court of the United States has not undertaken to specify the verbage to be used by the respective Legislatures.

Here, as is typical in obscenity cases, counsel 'picketh the nit.' Squabbles over technicalities and definitions have lured the courts to write fluently, resulting, oft times, in over defining obscenity. We appreciate the fact that obscenity is difficult to define; fortunately, it is not so difficult to detect. The printed material in contest here was not entered as exhibits in this Court, but quotations therefrom appear in the record. It is difficult to conceive of any definition which would not cover that which is printed in

> the record. Obviously, jurors applying contemporary community standards, concluded that the matter was obscene and proscribed. We, applying the same standards, agree.
>
> Our statute is not so broad as to overcome the presumption of constitutionality. State v. Barrett and Olson, ___S.C.___, 292 S.E.2d 590 (1982).

This Court is bound by this interpretation of South Carolina's statute by the State's highest court and must also rule that South Carolina's statute is not so broad as to overcome presumption of constitutionality which would justify declaring it invalid.

THEREFORE, the Respondents' Motion for Summary Judgment is granted and judgment is entered on behalf of the State of South Carolina.

AND IT IS SO ORDERED.

MATTHEW J. PERRY
United States District Judge
For the District of
South Carolina
Columbia Division

Columbia, South Carolina.
April 25, 1983.

APPENDIX C

United States Court of Appeals

For the Fourth Circuit

No. 83-6650

Harry F. Olson,

Appellant,

versus

William D. Leeke, Commissioner,
Department of Corrections and
The Attorney General of South
Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Matthew J. Perry, District Judge. (C/A 83-373-0)

Argued May 8, 1984 / Decided October 2, 1984

Before RUSSELL and ERVIN, Circuit Judges, and HAYNESWORTH, Senior Circuit Judge.

Charles W. Boyle; W. Gaston Fairey for Appellant; Sally M. Rentiers, Assistant Attorney General (T. Travis Medlock,

Attorney General, Donald J. Zelenka, Assistant Attorney General on brief) for Respondents.

HAYNESWORTH, Senior Circuit Judge:

The petitioner, Olson, was convicted of distributing obscene printed materials in violation of South Carolina Code §16-15-320. Denial of post-conviction relief was affirmed by the Supreme Court of South Carolina. State v., Barrett and Olson, 278 S.C. 92, 292 S.E.2d 590 (1982). Olson then sought a federal writ of habeas corpus which was denied by the district court.

I.

The Petitioner, relying on South Carolina Code §16-15-270, contends that he is not subject to prosecution until after a determination in a civil proceeding that the material was, in fact, obscene. That section has to do with searches and

seizures. It provides that a search warrant may be issued only by a circuit judge after a determination by him, after viewing the material or a description of it, that the material is obscene. In this case there was no search and no seizure. An undercover agent simply entered the bookstore and purchased the material which formed the basis of the prosecution.

Paragraph (g) of §16-15270 provides that the section does not prevent obtaining such materials by purchase. The South Carolina Supreme Court in Olson's post-conviction case specifically held §16-15-270 inapplicable to this case. Its interpretation of state law, of course, is binding upon us.

It is then suggested that due process requires that a defendant, charged with

selling explicit sexual material to willing adult purchasers, is entitled to a pre-indictment civil determination that the material is obscene. We find no such requirement in the cases or in reason. In Miller v. California, 413 U.S. 15, 24 (1973), the court addressed the problem of fair notice and specifically concluded that observance of the prerequisites to prosecution as set forth in Miller would provide fair notice to commercial dealers in such materials.

II.

While Olson concedes that South Carolina's obscenity statutes generally comport with constitutional requirements, he challenges the statute's definition of "patently offensive" in South Carolina §16-15-270(c). That subsection provides:

> "Patently offensive" means obviously and clearly disagreeable, objectional, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

He contends the statute is overbroad in prescribing contemporary standards of decency and propriety rather than a contemporary community standard of tolerance.

On occasion the Supreme Court in discussing obscenity problems has alluded to community standards of tolerance, see e.g., Smith v. United States, 431 U.S. 291, 305 (1977), and the Court of Appeals for the Fifth Circuit found that reference to standards of decency rather than to standards of tolerance created a problem. Red Bluff Drive-in, Inc. v. Vance, 648

F.2d. 1020 (5th Cir. 1981). It declined to decide the question in the abstract, however, observing that if there were any defect in the statute it was one readily curable by the state's construction of its own state. Subsequently, the Texas Court of Criminal Appeals held the statute constitutional. Andrews v. Texas, 652 S.W.2d 370 (1983).

There is nothing in the statute or the court's charge in this case that suggests that "patently offensive" means anything that the average citizen would find unbecoming or not in conformity with contemporary standards of decency in the community. To be found patently offensive materials must be found to be "obviously and clearly" inconsistent with, even obnoxious to, contemporary standards of

decency in the community. The standard seems as rigorous as that Olson advances. It does not condemn everything which the average person would not embrace, only what the average person would find repulsive. It is substantially th4e same thing as Olson's suggested standard of tolerance.

III.

We find no error in the denial of the writ. The judgment is affirmed.

AFFIRMED.